Supreme Court, U.S.
FILED
MAR 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSSCO HOLDINGS INCORPORATED,
a California Corporation,
d.b.a. QUAKER CORPORATION,
MICHAEL T. GHOSN,

Petitioners,

vs.

STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE

BRIEF OF GRIFFIN HOMES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL M. BERGER
Counsel of Record

of FADEM, BERGER & NORTON
A Professional Corporation

12424 Wilshire Boulevard
Post Office Box 250050
Los Angeles, California 90025
(213) 207-2727

Attorneys for Amicus Curiae
Griffin Homes, Inc.

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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Attorneys for Amicus Curiae
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By agreement of counsel for the parties, whose letters of consent have been filed with this Court's Clerk, Griffin Homes, Inc. files this brief as *amicus curiae* in support of the Petitioners.

INTEREST OF AMICUS CURIAE

Griffin Homes, Inc. is a California corporation engaged in the building of homes.

Griffin is presently in litigation over the constitutionality of a "growth limitation" ordinance adopted by the City of Simi Valley, California. (*Griffin Homes, Inc. v. City of Simi Valley,* Ventura County case no. 107352) In that litigation, Griffin seeks compensation for a regulatory taking of its property because the operation of the City's ordinance denies Griffin economically viable use of its property and interferes with its reasonable, investment backed expectations. The City is seeking to dismiss Griffin's complaint, in part because of the holding of the Court of Appeal in the case at bench, *i.e.*, because Griffin did not first seek a writ of "administrative mandamus" to invalidate the actions of the City.

Griffin thus has a vital interest in the outcome of this litigation as, in a substantial way, its litigational posture will be directly affected by this case.

INTRODUCTION

The California courts are at it again.

In 1987, this Court sent not one, but two unequivocal messages to the California judiciary that it was failing to provide the protection of property owners mandated by the Fifth Amendment. (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304; *Nollan v. California Coastal Commn.* [1987] 483 US 825) This Court's analysis of the lack of

protection provided property owners by the California courts[1] bore out the analysis of text writers and commentators who had long and frequently noted the unfairness of California property law. As Richard Babcock and Charles Siemon, long-time, national practitioners of land use law, pungently expressed it:

> "What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?
>
> * * *
>
> "California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat."[2]

Instead of heeding this Court's doubly reinforced message in *First English* and *Nollan*, the California

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[1] In *First English*, this Court told California:

> "... the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (482 US at 311)

In *Nollan*, this Court told California:

> "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." (483 US at 839)

[2] R. Babcock & C. Siemon, The Zoning Game Revisited (1985) 257, 293; emphasis in original.

courts have erected new roadblocks in the path of property owners seeking the protection this Court intended by those decisions.

The case at bench is a paradigmatic illustration of California's thumbing its nose at this Court's decisions. Rather than dealing forthrightly with an extortionate exaction by *the same agency* rebuked by this Court in *Nollan*, and either invalidating the conditions or compelling compensation for the property taken, the California Court of Appeal created a new precondition to a property owner's ability to seek the aid of the "self-executing" Just Compensation Clause[3] of the Fifth Amendment: *before* seeking compensation for a regulatory taking, the property owner must file a separate suit to *invalidate* the regulation. (*Rossco Holdings Inc. v. State* [1989] 212 Cal App 3d 642, 656)

That holding not only flies in the face of both *First English* (in which a suit for compensation was filed immediately after the regulation was adopted, with no challenge to the regulation's validity)[4] and *Nollan* (in

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[3] As this Court put it in *First English*:

> "We have recognized that a landowner is *entitled* to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . . [T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is *required* by the Constitution." (482 US at 315, 316; quoting with approval; internal quotation marks deleted)

[4] The County moved to dismiss the *First English* appeal because the property owner had failed to attack the validity of its regulations on grounds other than the absence of compensation. This Court denied the motion. (482 US at 314 n. 8)

which the property owner accepted the benefit of the permit while simultaneously challenging the extortionate condition in court), but also this Court's recent decision in *Preseault v. I.C.C.* (1990) ___ US ___, 58 USLW 4193.

In *Preseault*, this Court forcefully concluded that the proper rule is exactly the opposite of the new California rule: *before* seeking to invalidate a regulation on the ground that it is a taking, the property owner *must* seek compensation under the Fifth Amendment. As this Court concluded, "In sum, petitioners' failure to make use of the available [inverse condemnation] remedy renders their taking challenge to the ICC's order premature." (58 USLW at 4197)

As this Court has decided — as a matter of paramount federal Constitutional law — that compensation must be *first* sought and denied before a property owner may sue to invalidate governmental action as a regulatory taking of property, then California is not at liberty to invert that rule and require the property owner to *first* seek to invalidate the regulation.

This is no mere "procedural" difference, as the California Court of Appeal held at bench. (*Rossco*, 212 Cal App 3d at 656) It is the very heart of the Fifth Amendment issue: this Court held that a property owner cannot challenge the validity of a regulation without first seeking compensation, while the California courts held that a property owner cannot seek compensation without first challenging the validity of the regulation. The two "rules" cannot coexist.

In the last decade, this Court has spent considerable time and effort in attempting to outline the basic Constitutional rules applicable to dealings between property owners and property regulators. Many of the cases on which this Court has toiled have arisen in California.

Whether this Court's considered decision-making is to bring real world protection depends on how its decisions are applied by lower courts. The "application" demonstrated in the case at bench is outrageous. It is a defiance of this Court's decisions. Lower courts are able to act this way out of a belief that this Court's limited time will preclude review of their actions.

The decision below deserves this Court's swift repudiation.

Because the decision below is so plainly in conflict with this Court's decisions — particularly *First English*, *Nollan*, and *Preseault* — this case seems appropriate for a summary reversal and remand to the California Court of Appeal with instructions to reconsider its decision in light of the paramount decisions of this Court.

SUMMARY OF THE CASE

The case at bench is an effort by a property owner who was victimized by action of the California Coastal Commission similar to that struck down by this Court in *Nollan* as "extortion" (483 US at 837) to obtain compensation for what the same Coastal Commission unlawfully took from him. Until this Court struck down that condition in *Nollan* and held in *First English* that the Constitutionally-mandated remedy for an unconstitutional taking was compensation, the property owner in this case had no inverse condemnation cause of action in California. (*See Agins v. City of Tiburon* [1979] 24 Cal 3d 266; *overruled by First English.*) Thus, when the action below was filed *after* those two landmark decisions, it was filed at the earliest meaningful time. Before those decisions by this Court, no California court would have entertained the suit.

Fundamentally, what the Coastal Commission has done in this case is to prevent development UNLESS the property owner pays $297,500 to an environmental group and "dedicates"[5] vast acreage to the public. If the Commission had simply denied any use to the property owner, there is little question but that a taking of the entire ownership would have occurred. The grant of a permit accompanied by extortionate conditions precedent causes the same Constitutional taking.

A similar problem was recently analyzed by New York's highest court in *Seawall Associates v. City of New York* (1989) 74 NY 2d 92. There, in an attempt to help with New York City's homeless problem, the city passed an ordinance requiring the owners of single-room-occupancy hotels to fully maintain and rent all their rooms. Fines would be levied for non-compliance. Like the conditions at bench, the New York ordinance attempted to provide an escape valve. For the payment of money, an owner could escape from the terms of the ordinance. Relying, among other things, on *First English* and *Nollan*, New York's highest court struck down the scheme. Of interest here is its treatment of the conditions intended to ameliorate the taking:

> "If, as we hold, the effect of the moratorium and anti-warehousing measures is unconstitutionally to deprive owners of their basic rights to possess and to make economically viable use of their properties, merely allowing them to purchase exemptions from the law cannot alter this conclu-

[5] Eschewing label games, this Court's decision in *Nollan* makes clear that the "giving" of this property interest was in no sense a "voluntary" act of the property owner. (483 US at 834, n. 2)

> sion. In effect, the city, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the city not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a 'ransom' cannot make it lawful. Indeed, the stark alternatives offered by Local Law No. 9 — either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units) — amount to just the sort of exaction which could be classified, not as 'a valid regulation of land use but, "an out-and-out plan of extortion." [Citation.]' [Citations.]" (*Seawall*, slip op, pp 23-24)

The same is true here. What the Coastal Commission is attempting to cover up by its conditions prerequisite to development approval is a use prohibition which would violate the Constitution. Permitting the property owner to — in the words of the New York Court of Appeals — "ransom" his way out of that unconstitutional situation cannot be countenanced.

The direct conflict between the approaches of the California and New York courts on the question of "ransom" merits this Court's intervention.

THE CALIFORNIA COURTS HAVE THUMBED THEIR NOSES AT THIS COURT'S DECISIONS

The Court of Appeal's decision is based on the fundamental misconception that a challenge to the *validity* of a governmental action through administrative mandamus is the same as an inverse condemnation action which *accepts* the operation of that governmental action and challenges its Constitutionality because it takes property without compensation.

The two are not the same, as this Court has often held. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 425, in which this Court evaluated a statute designed to facilitate cable television communication:

> "The Court of Appeals determined that §828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (Emphasis added.)

(*See also Kaiser Aetna v. U.S.* [1979] 444 US 164, 174; *U.S. v. Security Indus. Bank* [1982] 459 US 70.)

As this Court put it in *First English*:

> "[The Fifth Amendment] is designed not to limit the governmental interference with property rights per se, but rather *to secure compensation in the event of otherwise proper interference amounting to a taking.*" (482 US at 315; emphasis added.)

In this Court's recent *Preseault* decision, that passage from *First English* was the basis for both the majority and concurring opinions.

Equally important, the Court of Appeal has misunderstood *First English* as requiring (or permitting a state to require) a property owner to *first* establish the invalidity of a government regulation through the mandamus process before seeking compensation for the taking wrought by the regulation.

That is *not* what happened in *First English*. There, no action was pursued to determine the police power validity of the County's action. Nonetheless, this Court held that the property owner was entitled to a determination of whether the regulation took its property.

That conclusion was compelled by this Court's Constitutional analysis. Please recall that *First English* concluded:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]
>
> "We have recognized that a landowner is *entitled* to bring an action in inverse condemnation as a result of ' "*the self-executing character of the*

> *constitutional provision with respect to compensation . . .*" ' [Citations.]" (482 US at 315; emphasis added.)

A remedy which is "self-executing" because violation of the Just Compensation Clause "necessarily" invokes it cannot be frustrated by any state procedure which requires a mandamus action to invalidate the regulation as a precondition to invocation of the "self-executing" remedy. By definition, a "self-executing" Constitutional remedy cannot be precluded by legislative action or inaction. (*First English*, 482 US at 316)

California's evisceration of the just compensation remedy which this Court has plainly and repeatedly held to be the primary and fundamental remedy for a regulatory taking of property is so at odds with this Court's paramount decisions interpreting the Fifth Amendment that immediate reversal and remand for reconsideration in light of this Court's decisions is appropriate.

THE "WAIVER" ISSUE WAS SQUARELY BEFORE THIS COURT IN *NOLLAN*

The trial court in this case concluded that *Nollan* abrogated the rule that a permit applicant cannot accept the permit and simultaneously sue to invalidate some of its conditions. In reversing, the Court of Appeal said that ". . . waiver was neither discussed nor in issue in *Nollan* . . ." (*Rossco*, 212 Cal App 3d at 656) The Court of Appeal is wrong in so saying. The issue was expressly raised and briefed in this Court in *Nollan*:

- In its motion to dismiss the appeal, the Coastal Commission entitled one of

its two substantive arguments: "APPELLANTS HAVE WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW BY CONSTRUCTING THE DEVELOPMENT PRIOR TO FINAL ADJUDICATION OF THIS MATTER."

- In its brief on the merits, the Coastal Commission used the same caption for a subheading of its argument that "THIS COURT LACKS JURISDICTION TO HEAR THIS CASE."

Thus, the Court of Appeal erred in its understanding of the procedural posture of *Nollan*. That error led to the erroneous attempt to distinguish *Nollan* aptly described in the Petition at bench. This Court was well aware of the "waiver" argument and concluded that it posed no bar to relief.

CONCLUSION

It seems evident that California's appellate courts do not like this Court's 1987 decisions in *First English* and *Nollan*. As the opinion in this case indicates, they are bending their considerable intellect to defeat property owners who seek the protection of this Court's decisions.

In light of *Williamson County Reg. Planning Commn. v. Hamilton Bank* (1985) 473 US 172, requiring regulatory taking cases to be brought in state (rather than federal) courts, this Court's supervision of how the state courts apply the federal constitutional law of takings is indispensable for all participants in land use planning

and regulation. Without clear guidance from this Court, confusion, unfairness, and anarchy will reign. That harms all and benefits none. California's intransigence breeds unpredictable litigational results, undermining confidence in the judicial system. This Court's decisions deserve respect, not what is demonstrated by the decision below. In the guise of applying this Court's decisions, the California Court of Appeal has eviscerated them.

An astute commentator had the following to say about the legacy which this Court created in *First English*:

> "What the decision did accomplish may be best described as a leveling of the playing field on which regulators and landowners contend. While compensation was unavailable when regulations took away the use of property, landowners were at a fundamental disadvantage in attempting to protect their constitutionally guaranteed property rights. *Regulators faced no real penalty for trampling on those rights, and behaved accordingly . . .*
>
> "The *First English* ruling has also insured an ultimate protection for individual property rights against violation by the government through regulations. That *revitalization of constitutional guarantees* is the most fundamental meaning of the case. *First English* stands as a reminder that even ends which benefit society do not justify means forbidden by the Constitution as unfair to individuals. Its reaffirmation of *the mutually*

> *dependent relationship between liberty and property* which lies at the heart of the fifth amendment may in the end prove to be its most significant message." (Comment, *He Who Calls the Tune Must Pay the Piper: Compensation for Regulatory Takings of Property After First English Evangelical Lutheran Church v. County of Los Angeles* [1988] 53 Mo L Rev 70, 120; emphasis added.)

In contrast to that commentator, the California Court of Appeal has contorted the "fundamental meaning" of this Court's 1987 decisions. Without this Court's action, Californians will be without the benefits of the Just Compensation Clause.

Because the decision below is so in conflict with this Court's recent decisions (particularly *First English, Nollan*, and *Preseault*) the appropriate result would seem to be an immediate, summary reversal with intructions that the California Court of Appeal reconsider its decision in light of this Court's controlling interpretations of the Fifth Amendment.

Respectfully submitted,

MICHAEL M. BERGER
of FADEM, BERGER & NORTON

Attorneys for Amicus Curiae
Griffin Homes, Inc.